NO. 48618-1

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

RAY C. HARRIS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frank Cuthbertson

No. 15-1-03573-0

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
MICHELLE HYER
Deputy Prosecuting Attorney
WSB # 32724

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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2. Whether the trial court properly admitted Gant's statements to Dr. Scheer when they were made for the purposes of medical diagnosis and treatment?

3. Whether this Court should exercise its discretion in imposing appellate costs when the defendant is 55 years of age, able-bodied and received a sentence of only four years in custody?

B. STATEMENT OF THE CASE.

1. Procedure

On December 22, 2015[1], the Pierce County Prosecutor's Office (State) charged Ray Charles Harris (defendant) by Third Amended Information with one count assault in the second degree, one count violation of a court order (protection or other), or in the alternative domestic violence court order violation, and one count assault in the fourth degree. CP 64-66. The State filed a persistent offender notice (third conviction). CP 5. Defendant was granted his motion to proceed pro se

[1] Defendant was first charged on September 8, 2015, by Information. CP 1-2. December 22, 2015, is the date of the third amended information. CP 64-66.

with standby counsel. CP 6; 9/22/15&10/16/15RP 8. On January 4, 2016, defendant waived his right to a jury trial. CP 92-93.

A CrR 3.5 hearing was conducted on January 6, 2016. 1/6/16RP 36-53. The trial court found the defendant's statements to police were admissible. 1/6/16RP 56; CP 133.

At the close of the State's case, defendant moved for a directed verdict, arguing that the State had not met their burden of proof. 1/11/16RP 138, 140. The trial court granted the defendant's motion as to count one, dismissing the charge of assault in the second degree. 1/11/16RP 141. The trial court found sufficient evidence for counts two and three and denied the motion as to those counts. 1/11/16RP 142-143.

Defendant presented no witnesses and did not testify. 1/11/16RP 143. On January 11, 2016, the trial court found defendant guilty of violating a court protection order and assault in the fourth degree. 1/11/16RP 147. On February 10, 2016, defendant was sentenced to a standard range sentence and ordered to pay mandatory legal financial obligations (LFOs). CP 112-125, 126-130. Defendant filed a timely notice of appeal. CP 146-147.

2. Facts

a. CrR 3.5 Hearing

Tacoma Police Officer Brett Beall testified that on September 7, 2015, at approximately 9:30 PM he was dispatched to a domestic violence

call at an apartment in Tacoma. 1/16/16RP 38. Beall located defendant walking on a sidewalk within a few blocks of the apartment. 1/16/16RP 39. Beall pulled his patrol car over to the sidewalk and addressed defendant by name. 1/6/16RP 40. He observed defendant's demeanor as calm and cooperative. 1/6/16RP 40. Beall testified that at that point, defendant was not under arrest nor detained but that he (Beall) believed he would have stopped defendant had he tried to walk away. 1/6/16RP 51.

Beall asked defendant what happened at the apartment. 1/6/16RP 40. Defendant told Beall that he had made food for his girlfriend of three years, Precious Gant, which she refused to eat and that started an argument. 1/6/16RP 40-41, 42. Defendant stated that Gant started throwing things in the apartment, then slapped him and that he slapped her back then left. 1/6/16RP 41. Defendant told Beall that he left the apartment because he was tired of dealing with her (Gant), and not to avoid encountering law enforcement. 1/6/16RP 42. Defendant stated he knew Gant was calling the police. 1/6/16RP 43.

Beall asked defendant if he had a protection order with Gant or any warrants. 1/6/16RP 44. Defendant responded that he knew there was a protection order but thought it had expired. 1/6/16RP 44. Beall ran defendant's name and learned there was a current protection order between defendant and Gant. 1/6/16RP 44. Beall communicated via radio

with Officer Butts who was on the scene with Gant and relayed what defendant had said. 1/6/16RP 44-45. Based on the information he received from Butts, Beall put defendant in handcuffs and placed him in the back of the patrol car. 1/6/16RP 45. At that point, Beall read defendant his ***Miranda***[2] rights from an advisement of rights form. 1/6/16RP 45.

After being read his rights, defendant chose not to answer any questions and said, "Let's just go to jail." 1/6/16RP 46. Beall transported and booked defendant into jail. 1/6/16RP 47.

Beall testified that he did not make any promises to nor threatened defendant in any way. 1/6/16RP 47. He did not yell or curse at defendant and did not have his weapon drawn. 1/6/16RP 47, 51. Defendant appeared to Beall to be voluntarily speaking and with an understanding of the conversation they were having. 1/6/16RP 47.

Defendant did not testify as part of the CrR 3.5 hearing and made no argument against the admissibility of his statements to police. 1/6/16RP 55. The trial court found there were no disputed facts for the purpose of the CrR 3.5 hearing, that defendant's statements were made voluntarily, and that they were not the product of custodial interrogation. 1/6/16RP 55-56; CP 133.

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[2] ***Miranda v. Arizona***, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

b. Substantive Facts

On September 7, 2015, Tacoma Police Officers Julie Dier and Steve Butts responded to a domestic disturbance call at an apartment in Tacoma. 1/11/16RP 127-129. Upon arrival, Dier contacted the victim, Precious Gant. 1/11/16RP 129. Dier observed injuries on Gant consisting of a scratch or red mark on the left side of her cheek, a scratch and bruise on her upper left arm, and slight redness on her neck. 1/11/16RP 130-131. Gant's injuries were consistent with what she reported to Dier. 1/11/16RP 131.

Prior to testimony from Dr. Diane Scheer, the emergency room physician who treated Gant, defendant objected on the grounds that the testimony violated the confrontation clause. 1/11/16RP 82-83. The trial court allowed the physician to testify to non-testimonial statements about her medical diagnosis and treatment of Gant. 1/11/16RP 83, 86.

Dr. Scheer testified Gant stated she was punched multiple times to the left side of her body by her boyfriend. 1/11/16RP 92. Gant exhibited pain to the areas where she was punched, which were her left cheek, left arm and left side of her head. 1/11/16RP 92-93. Scheer documented in her examination that Gant had an abrasion to the left cheek and left posterior ear as well as tenderness to the left shoulder. 1/11/16RP 93.

The nurse that triaged Gant when she arrived to the emergency room, Terri Villanueva, testified Gant told her she had been punched with a closed fist three times, one to the left arm, to the left cheek, and to the

left side of the head. 1/11/16RP 115. Gant also told Villanueva that she had been choked. 1/11/16RP 115. Villanueva further testified that Gant stated she filed a police report and had a safe place that she would be able to stay. 1/11/16RP 115.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY ADMITTED STATEMENTS DEFENDANT MADE TO OFFICER BEALL BECAUSE THEY WERE NONCUSTODIAL STATEMENTS MADE DURING A BRIEF INVESTIGATIVE STOP.

Unchallenged findings of fact following a CrR 3.5 hearing are verities on appeal. ***State v. Lorenz***, 152 Wn.2d 22, 36, 93 P.3d 133 (2004). A trial court's conclusions of law are reviewed de novo. *Id.*

Miranda warnings are intended to protect a suspect's right not to make incriminating statements to police while in the coercive environment of police custody. ***State v. Heritage***, 152 Wn.2d 210, 214, 95 P.3d 345 (2004). ***Miranda*** is triggered when a suspect endures custodial interrogations by an agent of the State. *Id.* "In custody" for the purposes of ***Miranda*** means freedom of action curtailed to a degree associated with formal arrest. ***State v. Harris***, 106 Wn.2d 784, 789-90, 725 P.2d 975 (1986) (citing ***Berkemer v. McCarty***, 468 U.S. 420, 104 S. Ct. 3138, 3151, 82 L.Ed.2d 317 (1984)). The test is an objective test based on how a reasonable person in the circumstances would have perceived the situation. ***Yarborough v. Alvarado***, 541 U.S. 652, 667, 124 S. Ct. 2140,

158 L. Ed. 2d 938 (2004); ***Heritage***, 152 Wn.2d at 217. It is irrelevant whether the officer's unstated plan was to take the suspect into custody should he try to leave or that the suspect was the focus of a police investigation. ***Lorenz***, 152 Wn.2d at 37 (citing ***Beckwith v. United States***, 425 U.S. 341, 347, 96 S. Ct. 1612, 48 L. Ed. 2d 1 (1976)).

Terry[3] stops are non-custodial for ***Miranda*** purposes. ***Heritage***, 152 Wn.2d at 218 (citing ***Berkemer***, 468 U.S. at 439-40). This is because they are brief and occur in public, making them "substantially less police dominated" than the interrogations contemplated by ***Miranda***. ***Heritage***, 152 Wn.2d at 218. To qualify as a ***Terry*** stop, the detention must be reasonably related in scope to the justification of its initiation. ***Terry***, 392 U.S. at 29. A detaining officer may ask a moderate number of questions during a ***Terry*** stop to determine identity and to confirm or dispel suspicions without rendering the suspect in custody. ***Heritage***, 152 Wn.2d at 218. ***Miranda*** is not required when the questions are part of a "routine, general investigation in which the defendant voluntarily cooperated but is not yet charged." ***State v. Short***, 113 Wn.2d 35, 41, 774 P.2d 458 (1989).

Officer Beall's contact with defendant in this case is analogous to a ***Terry*** stop, not custodial interrogation. Defendant was walking on a sidewalk in public when Beall pulled his patrol car over and addressed defendant by name. CP 132; 1/6/16RP 39-40. Defendant was not under

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[3] ***Terry v. Ohio***, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

arrest nor detained. 1/6/16RP 51. The encounter between Beall and defendant was brief, only long enough for Beall to confirm his suspicions that defendant was involved in the domestic violence call to which Beall was responding. Beall asked a simple question, "what happened at the apartment," as part of a routine, general investigation and to which defendant responded by providing his version of events. CP 332; 1/6/16RP 40-42. Defendant was calm and cooperative during the encounter. CP 132; 1/6/16RP 40. The fact that Beall believed he would have stopped defendant if he tried to leave did not make the encounter comparable to a formal arrest. *See* ***State v. Walton***, 67 Wn. App. 127, 130, 834 P.2d 624 (1992). Beall was attempting to affirm or deny the victim's statements about the physical altercation. The record shows defendant made the challenged statements about what happened at the apartment during the non-custodial ***Terry*** stop; therefore, ***Miranda*** warnings were not a prerequisite for their admissibility.

2. THE TRIAL COURT PROPERLY ADMITTED GANT'S STATEMENTS MADE TO DR. SCHEER FOR THE PURPOSES OF MEDICAL DIAGNOSIS AND TREATMENT.

a. <u>The trial court properly admitted Gant's statements to Dr. Scheer because they were made for the purposes of medical diagnosis and treatment.</u>

Hearsay statements may be admitted under Evidence Rule (ER) 803(a)(4) which provides:

> Statements made for purposes of medical diagnosis or treatment and which describing medical history, past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

ER 803(a)(4). In domestic assault cases, a statement attributing fault to an abuser may be reasonably pertinent to medical treatment. ***State v. Price***, 126 Wn. App. 617, 640, 109 P.3d 27 (2005). Treating medical personnel often need to know the identity of the perpetrator in order to render proper treatment such as recommending therapy or counseling as well as instructing the victim to remove him or herself from the dangerous environment. *Id.*

Courts consider whether (1) the declarant's motive in making the statement was to promote treatment and (2) the medical professional reasonably relied on the statement for purposes of treatment in determining admissibility of statements under ER 803(a)(4). ***In re the Pers. Restraint of Grasso***, 151 Wn.2d 1, 20, 84 P.3d 859 (2004). Evidentiary rulings will not be disturbed unless manifestly unreasonable. ***State v. Woods***, 143 Wn.2d 561, 595-96, 23 P.3d 1046 (2001).

Defendant only challenges statements from the emergency room doctor, Dr. Scheer. Brief of App. 11-13. The challenged statements were pertinent to the diagnosis and treatment of Gant as a domestic assault victim. *See* ***Price***, 126 Wn. App. at 640. Gant told Dr. Scheer she was punched multiple times to the left side of her body by her boyfriend in

response to a routine question regarding what brought her in to the emergency room. 1/11/16RP 92-93. Although Gant told Villanueva, the triage nurse, that she had a safe place to stay and had filed a police report, there is nothing in the record to suggest Gant identified her assailant or her relationship with him to Villanueva. 1/11/16RP 115. Without the context of Gant's statements to Villanueva, Dr. Scheer lacked information necessary to assess whether psychological treatment and additional safety measures should be prescribed. The relationship of the assailant to Gant was necessary information that Dr. Scheer obtained as part of a complete patient history for diagnosis and treatment. 1/11/16RP 92. Dr. Scheer testified that being scared, anxious, or frightened would have caused some of the symptoms exhibited by Gant, showing the mental state attendant with domestic assault was pertinent to diagnosing the symptoms presented. 1/11/16RP 94.

Dr. Scheer also testified she asks about the facts and circumstances surrounding why a patient came in to the emergency room because that is "usually where the history is, usually 90 percent of the diagnosis." 1/11/16RP 92. After receiving the additional information from Gant during her exam, Dr. Scheer made a diagnosis of "assault, abrasion, and contusion." 1/11/16RP 94. Gant relayed the facts and circumstances leading to her emergency room visit upon which Dr. Scheer reasonably relied in making a diagnosis of assault; therefore, the statement was properly admitted under ER 803(a)(4).

b. Even if this Court were to find Dr. Scheer's statements were admitted in error, the error was harmless because defendant's own statements were sufficient to support a finding of guilty.

If a hearsay statement is admitted in violation of ER 803(a)(4), courts determine whether the admission was nevertheless harmless. ***State v. Alvarez-Abrego***, 154 Wn. App. 351, 369, 225 P.3d 396 (2010). A reviewing court may evaluate the possible effect of the statement in the context of all the evidence presented at trial. *Id.* "If the untainted evidence is so overwhelming that it necessarily leads to a finding of the defendant's guilt, the error is harmless." ***State v. Koslowski***, 166 Wn.2d 409, 431, 209 P.3d 479 (2009).

"A person is guilty of assault in the first degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another." RCW 9A.36.041. Assault is defined as:

> [A]n intentional touching or striking or cutting or shooting of another person, with unlawful force, that is harmful or offensive, regardless of whether any physical injury is done to the person. A touching or striking or cutting, or shooting is offensive if the touching or striking or cutting or shooting would offend an ordinary person who is not unduly sensitive.

WPIC 35.50 (internal brackets omitted), *see* ***State v. Osman***, 192 Wn. App. 355, 366 P.3d 956 (2016).

For a finding of guilty of violation of a court order, the State had to prove defendant knew of the existence of a protection order, he knowingly

violated a provision of the order, and he had twice been previously convicted for violating the provisions of a court order. WPIC 36.51.01.

Here, the evidence is overwhelming. Officer Beall testified that defendant admitted he slapped Gant. 1/6/16RP 41; CP 139. Defendant further stated he knew Gant was calling the police and he was aware there was a protection order with her. 1/6/16RP 43-44. Beall's testimony regarding defendant's statements was sufficient in establishing the identity of Gant's assailant and in establishing defendant knew of the protection order Gant had against him. 1/6/16RP 41, 44. The testimony also showed defendant violated the court order prohibiting contact with Gant. 1/6/16RP 42. Defendant identified Gant as his girlfriend and confirmed he had just gotten into an argument with her. 1/6/16RP 40-41. Defendant further affirmed he had intentionally touched Gant in an offensive way when he admitted to slapping her. 1/6/16RP 41. Beall's testimony alone is sufficient in proving defendant committed assault in the fourth degree and in proving defendant committed the crime of violation of a court order[4].

Additional evidence further supported a finding of guilty of assault. Testimony from Tacoma Police Officer Dier and emergency room

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[4] Defendant does not appear to contest the State proved he had twice been previously convicted for violating the provisions of a court order in his opening brief. Brief of App. 6-13. Nevertheless, the record shows the State adduced evidence of defendant's prior convictions for violating the provisions of a court order by admitting into evidence a certified copy of the Tacoma Municipal Court Judgment for the two previous convictions. CP 108, 139. Although defendant disputes Tacoma Municipal Court's finding of guilty in the previous cases as improper in his statement of additional grounds, those cases are not before this Court in this matter.

nurse Villanueva corroborate that Gant was intentionally touched in an offensive manner. Dier testified that she saw bruising forming on Gant's left upper arm along with a fresh scratch, a scratch on her left cheek, and slight redness around her neck. 1/11/16RP 130-31; CP 139. Villanueva testified that Gant stated she was punched on the left arm, left cheek, left side of the head, and that she was choked. 1/11/16RP 114-115. The injuries observed by Officer Dier are consistent with the statements Gant made to the Villanueva regarding how she sustained those injuries and which did not include identifying the assailant. 1/11/16RP 115, 130-131.

The most compelling evidence of the assault and court order violation was not Dr. Scheer's testimony but rather the victim's physical injuries. Even without Dr. Scheer's testimony, the State provided overwhelming evidence supporting a finding of guilty of assault in the fourth degree and violation of a court order.

3. APPELLATE COSTS ARE APPROPRIATE IF THIS COURT AFFIRMS THE DEFENDANT'S JUDGMENT WHEN THE DEFENDANT IS 55 YEARS OF AGE, ABLE-BODIED AND RECEIVED A SENTENCE OF FOUR YEARS IN CUSTODY.

Under RCW 10.73.160, an appellate court may order the recoupment of appellate costs from a convicted defendant. ***State v. Blank***, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997). The award of appellate costs to a prevailing party is within the discretion of the appellate court. *See* ***State v. Sinclair***, 192 Wn. App. 380, 383-384, 367 P.2d 612 (2016),

review denied, 185 Wn.2d 1034 (2016); *see also* ***State v. Nolan***, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); RAP 14.2.

The legal principle that convicted offenders contribute toward the costs of the case, including the costs of appointed counsel, goes back many years. In 1976[5], the Legislature enacted RCW 10.01.160, which permitted the trial courts to order the payment of various costs, including that of prosecuting the defendant and his incarceration. RCW 10.01.160(2). Requiring a defendant to contribute toward paying for appointed counsel under this statute does not violate or even "chill" the right to counsel. ***State v. Barklind***, 87 Wn.2d 814, 818, 557 P.2d 314 (1977).

In 1995, the Legislature enacted RCW 10.73.160, which specifically authorized the appellate courts to order the (unsuccessful) defendant to pay appellate costs. RCW 10.73.160(1). In ***Blank***, the Supreme Court held this statute constitutional, affirming this Court's holding in ***State v. Blank***, 80 Wn. App. 638, 641-642, 910 P.2d 545 (1996). ***Blank***, 131 Wn.2d at 239.

Nolan, 141 Wn.2d at 620, noted that in ***State v. Keeney***, 112 Wn.2d 140, 769 P.2d 295 (1989), the Supreme Court found the imposition of statutory costs on appeal in favor of the State against a criminal

[5] Actually introduced in Laws of 1975, 2d Ex. Sess. Ch. 96.

defendant to be mandatory under RAP 14.2 and constitutional, but that "costs" did not include statutory attorney fees. ***Keeney***, at 142.

Here, defendant appeared to be able-bodied and capable of working. He is only 55 years of age and received a relatively short sentence of four years. CP 119, 125. Although defendant stated during sentencing that he had been HIV positive for the past 15 years, there is nothing in the record to suggest his HIV status impacts his future earnings potential. 2/5/16RP 174. Any assertion that defendant cannot and will never be able to pay appellate costs is unsupported by the record. Therefore, this Court should properly exercise its discretion in determining whether to impose appellate costs.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court affirm defendant's conviction and sentence below.

DATED: January 30, 2017.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

42892 for

MICHELLE HYER
Deputy Prosecuting Attorney
WSB # 32724

Stacy Norton
Rule 9 Legal Intern

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1.30.19 Teresa Kay
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